IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION 66 OF 2001.

Shri Krishna Sharma,
resident of Vasco-da-Gama,
Goa. ... Petitioner.

VERSUS

1. Mormugao Municipal
Council through its
Chief Officer,
Municipal Building,
Vasco-da-Gama, Goa.

2. Mr. Tulsidas B. Naik,
resident of Dactolem
Near Krishna Temple,
Mangor, Vasco-da-Gama,
Goa. ... Respondents.

Petitioner absent.

Mr. S. Karpe, Advocate for the Respondent No.2.

CORAM: V. C. DAGA, J.

DATE: 5TH JULY, 2002.

ORAL JUDGMENT:

None for the petitioner. Heard learned counsel for the Respondent No.2. With the assistance of the counsel for Respondent No.2 perused the record.

2. This Revision is directed against the Order dated 23rd January, 2001 passed by the Civil Judge J.D., Vasco-da-Gama in Regular Civil Suit No.112/91/C on the application dated 16.9.2000 moved by the plaintiff/petitioner under Order 23, Rule 1 of C.P.C..

3. The plaintiff had filed a suit for declaration and permanent injunction being Regular Civil Suit No.119/91/A. On being summoned, the defendant No.2 appeared and preferred counter claim against the plaintiff. During the course of the trial, the plaintiff moved an application under Order 23, Rule 1 of C.P.C. seeking withdrawal of the Suit, with liberty to file fresh suit, on the ground that after filing of the suit certain subsequent events have taken place. While seeking withdrawal of Suit, liberty to file fresh suit on the same cause of action was sought by the petitioner.

4. The Trial Court while granting the application seeking withdrawal of Suit, refused to grant leave as sought, however permitted the plaintiff/petitioner to withdraw his suit and directed that the counter claim shall proceed in accordance with law. Aggrieved by the said order of the Trial Court present revision is filed. It appears that at the time of admission petitioner restricted his challenge to the order to the extent it directed trial of the counter claim. Consequently, refusal on the part of the Trial Court to grant leave to file fresh suit is not subject matter of challenge in this revision. It is also obvious from the fact that the Rule has been issued only against the Respondent No.2.

5. Since no Rule was issued against respondent No.1 the revision will have to be treated as dismissed against the Respondent No.1. In view of the dismissal of the revision against Respondent No.1 the impugned order has become final. Consequently the order refusing to grant leave and permitting withdrawal of the Suit has become final and is not open to challenge.

6. It appears from the tenor of the revision petition that the order of the Trial Court permitting defendant No.2 to proceed with his counter claim is the subject matter of challenge. As a matter of fact with the withdrawal of the Suit, it was well within the jurisdiction of the Trial Court to order trial of the counter claim in accordance with law. With the withdrawal of Suit, counter claim cannot be treated as withdrawn or dismissed. As a matter of fact the mandate of Order 8, Rule 6-D of C.P.C. is in any case in which the defendant sets up a counter claim, the suit of the plaintiff is discontinued or dismissed, counter claim may nevertheless be proceeded with.

7. In this view of the matter no fault can be found with the impugned order. This petition is

therefore dismissed. Rule stands discharged with no order as to costs.

(V. C. DAGA)
JUDGE.

sl.